

Honorable Benjamin H. Settle

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JONATHAN NELSON and MARGO
NELSON, individually and on behalf of their
marital community,

PLAINTIFFS,

v.

SPECIALIZED LOAN SERVICING, LLC, a
foreign limited liability company,

DEFENDANT.

No. 3:20-cv-05461-BHS

**PLAINTIFFS' MOTION TO CERTIFY
QUESTIONS TO THE WASHINGTON
SUPREME COURT AND MOTION TO
STAY PENDING CERTIFIED
QUESTIONS**

**NOTED ON MOTION CALENDAR:
October 2, 2020**

I. INTRODUCTION & RELIEF REQUESTED

Plaintiffs respectfully move the Court to: (1) certify the below questions to the Washington Supreme Court regarding whether a lender can collect or threaten to collect time-barred installment payments through a nonjudicial foreclosure action; and (2) stay the instant proceeding until the certified questions are resolved. This issue is pending before the Court on Plaintiffs' Amended Motion for Reconsideration, which is being filed concurrently with this motion. As this a complex issue of state law undecided by Washington courts, Plaintiffs request

1 that the Court seek a definite answer to these questions from the Washington Supreme Court
2 and stay this action pending clarification from the Washington Supreme Court.

3 II. ARGUMENT

4 A. Standard for Certification to Washington State Supreme Court

5 When a federal court determines there is no controlling Washington Supreme Court
6 precedent on issues of state law, the court must apply the law as it believes the Washington
7 Supreme Court would under the circumstances. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64
8 (1938). “If there be no decision by [the state’s highest] court then federal authorities must apply
9 what they find to be the state law after giving ‘proper regard’ to relevant rulings of other courts
10 of the State.” *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). As this Court stated in
11 *W.H. v. Olympia Sch. Dist.*, No. C16-5273 BHS (W.D. Wash. Sep. 6, 2019), “...another option is
12 available to the Court. Rather than guessing what the Washington Supreme Court would decide,
the Court may certify the question to the Washington Supreme Court for review.”

13 Washington’s Federal Court Local Law Certificate Procedure Act provides:

14 When in the opinion of any federal court before whom a proceeding is pending, it
15 is necessary to ascertain the local law of this state in order to dispose of such
proceeding and the local law has not been clearly determined, such federal court
may certify to the supreme court for answer the question of local law involved
and the supreme court shall render its opinion in answer thereto.

16 Wash. Rev. Code §2.60.020. The Washington Supreme Court’s implementing rule
17 provides that certified questions may be considered where the state law issue “has not been
18 clearly determined and does not involve a question determined by reference to the United States
19 Constitution.” Wash. R. App. P. 16.16. Federal authority recognizes the advantages to the federal
20 bench of certifying novel or unsettled questions of state law to the state’s highest court. *See*
21 *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741 (U.S. 1974) (certifying questions

1 saves “time, energy, and resources and helps build a cooperative judicial federalism”);
2 *Micomonaco v. State of Wash.*, 45 F.3d 316, 322 (9th Cir. 1995) (certification procedure is “a
3 means to obtain authoritative answers to unclear questions of state law”) (quoting *Toner v.*
4 *Lederle Labs.*, 779 F.2d 1429, 1432 (9th Cir. 1986)). The Western District of Washington has in
5 fact, certified questions to the Washington State Supreme Court on “issues of first impression”
6 on numerous occasions. *See e.g. Morella v. Safeco Ins. Co. of Ill.*, No. C12-0672RSL (W.D.
7 Wash. Apr. 12, 2013); *Danny v. Laidlaw Transit Services, Inc.*, No. C05-1047L (W.D. Wash.
8 Jan. 20, 2006) (where, as here, “Certification is particularly appropriate here because this case
9 was originally filed by plaintiff in state court and removed by defendant.”); *W.H. v. Olympia Sch.*
10 *Dist.*, No. C16-5273 BHS (W.D. Wash. Sep. 6, 2019). Notably, this District has found similar
11 questions involving interpretation of Washington’s Deed of Trust Act to warrant certification to
12 Washington’s Supreme Court. *See Frias v. Asset Foreclosures Servs., Inc.*, 2:13-cv-00760-MJP,
13 Dkt. 48 (W.D. Wash. Sept. 25, 2013); *Bain v. Metropolitan Mortgage Group Inc. et al.*, 2:09-cv-
14 00149-JCC, Dkt. #159 (W.D. Wash. Jun. 27, 2011).

14 **B. Washington Law Is Unclear Whether Time-Barred Installment Payments May Be
15 Collected In a Nonjudicial Foreclosure Action**

15 While Washington courts recently clarified state law interpreting the statute of limitations
16 in the context of an installment note¹, the issue of whether a lender can collect time-barred
17 installment payments through nonjudicial foreclosure action is one of first impression. As
18 Plaintiffs’ argue in their Amended Motion for Reconsideration, Washington courts suggest that
19 time-barred installments may not be collected through a nonjudicial foreclosure action.

20
21 ¹ When an installment promissory note is involved, the statute of limitations runs against each and every installment
from the time each one becomes due. *See, e.g. Edmundson v. Bank of Am., N.A.*, 194 Wn. App. 920, 378 P.3d 272
(Wash. Ct. App. 2016); *Merceri v. Bank of N.Y. Mellon*, 4 Wn. App. 2d 755, 760 n.1 (Wash. Ct. App. 2018).

1 For example, in *George v. Butler*, a lender initiated foreclosure on a mortgage securing
2 two notes. *George v. Butler*, 26 Wash. 456, 457-58 (1901). One of the notes had matured more
3 than six years before initiation of the foreclosure, and thus, was beyond the statute of limitations.
4 *Id.* The court applied the same statute of limitations to the foreclosure as it did to the note. *Id.* at
5 468. The court reasoned that in Washington, a mortgage is a “mere incident to the note, and its
6 only purpose being to secure the same.” *Id.* While this principal of barring collection of time-
7 barred debt through foreclosure actions can be applied to the facts of the instant case, Plaintiffs
8 believe a more definite statement from the Washington Supreme Court is warranted.

9 Other cases that touch on the issue at hand include *Cedar W. Owners Ass'n, Nonprofit*
10 *Corp. v. Nationstar Mortg., LLC*. 434 P.3d 554, 557 (Wash. Ct. App. 2019). In *Cedar West*
11 *Owners*, the borrower missed his payment due June 1, 2010 and all subsequent payments. *Id.* at
12 557. On October 18, 2016, the lender, through the foreclosure trustee, recorded a Notice of
13 Trustee Sale for a nonjudicial foreclosure. *Id.* at 558. The successor in interest to the borrower
14 later filed suit to quiet title. *Id.* The court concluded that the statute of limitations began to
15 accrue on the first missed monthly installment. *Id.* The court ultimately ruled that Nationstar
16 Mortgage was entitled to foreclose, but only “on the installment payments due on and after
17 November 1, 2010” which became due six years prior to Nationstar's Notice of Trustee's Sale.
18 *Id.* at 562. The conclusions of *Cedar West Owners* support Plaintiffs’ position that time-barred
19 installment payments may not be collected through a nonjudicial foreclosure, but the lack of a
20 clear statement of the reasoning for this specific conclusion in *Cedar West Owners* promotes
21 resolution of the question by the Washington Supreme Court.

Moreover, as Plaintiffs argue in their Amended Motion for Reconsideration, allowing
recoupment of time-barred installment payments through nonjudicial foreclosure is in direct

1 contradiction to Washington's policy of barring collection actions of time-barred debts. Statute
2 of limitations exist to promote certainty of titles and eliminate the fears and burdens of litigation.
3 *Walcker v. Benson & McLaughlin, P.S.*, 79 Wash. App. 739, 745-46 (1995) (rejecting "an
4 unlimited right to foreclose deeds of trust."). Moreover, to allow recoupment through nonjudicial
5 foreclosure would subject a single promissory note to two different limitations periods based on
6 whether the lender elected to initiate a judicial or nonjudicial foreclosure. Such a distinction is in
7 contradiction to established Washington law and the policy promoting statutes of limitations.

8 When Washington law supports Plaintiffs' position, there is no definite statement on this
9 issue that has been given by Washington courts, and as such, certification of these complex
10 issues of state law is warranted.

11 **C. This Action Should Be Stayed Until The Washington Supreme Court Resolves The
12 Certified Questions**

13 Plaintiffs respectfully request that this Court stay this proceeding until the Washington
14 Supreme Court provides guidance on the certified questions. "The power to grant a stay in
15 pending litigation is incidental to the power inherent in every court to control the disposition of
16 the cases on its docket." *Landis v. North Am. Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed.
17 153 (1936). A stay is warranted where "the subject matter of the proceedings is highly complex
18 and it is the avoidance of a duplication of that very complexity that serves in part to justify the
19 stay." *Chronicle Pub. Co. v. National Broadcasting Co.*, 294 F.2d 744, 749 (9th Cir. 1961).

20 Here, a stay is warranted if the Court certifies the proposed questions to the Washington
21 Supreme Court. The certified questions will ultimately determine the pending Motion for
Reconsideration, and as such, staying the instant proceeding will avoid duplication of resolving
these complex questions of state law. Defendant is a licensed debt collector that frequently seeks
to collect on installment notes through nonjudicial foreclosure, and as such, would not be

1 prejudiced by clarification from the Washington Supreme Court on this important issue of state
2 law.

3 **III. PROPOSED CERTIFIED QUESTIONS**

4 Plaintiffs propose that the Washington Supreme Court have the opportunity to resolve
5 the following questions:

6 1. Under Washington law, is a lender entitled to collect time-barred installment
7 payments in a nonjudicial foreclosure action?

8 2. Whether threatening to collect time-barred installment payments in a nonjudicial
9 foreclosure action is an unfair or deceptive act in violation of Washington's Consumer
10 Protection Act, RCW 19.86?

10 **IV. CONCLUSION**

11 For the foregoing reasons, Plaintiffs respectfully request that this Court certify the
12 proposed questions to the Washington Supreme Court and stay this action pending resolution of
13 the certified questions from the Washington Supreme Court.

14 DATED this 11th day of September, 2020.

15 Respectfully submitted,

16 *Attorneys for Plaintiffs*

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